

THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Attorney Fees

Plaintiff alleged claims against the defendant for negligence and breach of contract. Defendant was provided a defense by its insurer pursuant to a reservation of rights letter. A Pendleton, Oregon jury returned a verdict for the defendant. Under defendant's contraction contract with the homeowners, the prevailing party was entitled to recover attorney fees and costs. Plaintiff argued that defendant was not entitled to recover fees because it did not hire the attorneys, and pursuant to its reservation of rights letter, the insurer paid nothing to defend defendant against the breach of contract claim. Judge Stewart rejected plaintiff's argument and found for the defendant.

Country Mutual v. Gyllenberg Construction, CV 03-856-ST (Opinion February 28, 2005)
Plaintiff's Counsel: Francis Maloney
Defense Counsel: Jeffrey Eberhard

Amend Complaint

Plaintiff filed an action against the City of Portland and four police officers alleging excessive force, and unreasonable search and seizure, among other claims. The plaintiff filed an Amended Complaint to which the City of Portland filed a motion to dismiss alleging that plaintiff's Section 1983 claims against the City as stated in the Amended Complaint should be dismissed because they do not relate back to the allegations contained in the original Complaint.

Judge Haggerty denied the City's motion to dismiss, applying the relation-back doctrine pursuant to FRCP 15©) and finding that the plaintiff's new claim emanated from the same set of facts alleged in the original Complaint, referenced the same defendant, the same location, the same police officers, and the same incident.

John v. City of Portland, CV 04-1176-HA
(Opinion March 15, 2005)
Plaintiff's Counsel: Bruce Brewer

Defense Counsel: David Landrum

Motion Dismiss

A former employee of the Oregon Fish and Wildlife Division (ODFW) brought an action in federal court against ODFW and its Regional Manager alleging claims under 42 U.S.C. § 1983 and Oregon common law arising from his discharge. Defendants moved to dismiss ODFW from the Section 1983 claim on the basis that ODFW, as a state agency, is not a Section 1983 "person." Plaintiff conceded that Motion. Defendants also moved to dismiss ODFW from the common law wrongful discharge claim on the basis of its Eleventh Amendment immunity from action in federal court. Plaintiff, however, argued ODFW had waived its immunity when it filed a "Consent to Jurisdiction by a Magistrate Judge."

Judge Brown concluded ODFW's filing of a consent to magistrate in this case merely expanded the universe of judicial officers who could

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decide the motion to dismiss and did not amount to a voluntary invocation of federal jurisdiction.

Bjornstrom v. State of Oregon,
CV 04-1877-BR
(Opinion, May 19, 2005)
Plaintiff's Counsel: Roxanne Farra
Defense Counsel: Andrew Logerwell

Federal Telecommunications Act

The City of Portland (City) filed a complaint against Electric LightWave, Inc. (ELI), for breach of contract for failing to pay franchise fees due and owing under a municipal franchise (Franchise Agreement) the City and ELI entered into eight years ago. ELI responded to the complaint that it was no longer required to comply with the terms of the contract under the Federal Telecommunications Act of 1996, 47 U.S.C. § 253 (FTA or Act). The parties filed cross-motions for summary judgment - the City asked for judgment on its breach of contract claim and ELI asked for a declaration that the Franchise Agreement was preempted by the Act.

Judge Ashmanskas analyzed the Franchise Agreement under section 253, which provides that all state and local regulations that may prohibit or have the effect of

prohibiting any company's ability to provide telecommunications services are preempted unless such regulations fall within either of the statute's two "safe harbor" provisions, sections 253(b) and ©). Judge Ashmanskas determined that two sections were preempted; namely, the requirement that ELI offer services to the City at its "most favorable rate"; and the requirement that ELI provide "in-kind" compensation in the form of telecommunications duct and cable for the City's use. Significantly, however, Judge Ashmanskas upheld the City's Franchise fee of 5% of ELI's "gross revenues" earned from telecommunications services in the City as fair compensation in return for use of the City's rights of way. Judge Ashmanskas severed the two preempted provisions from the Franchise Agreement and left the balance of Franchise Agreement in force.

City of Portland v. Electric Lightwave CV 03-538-AS
Plaintiff's Counsel: Terrence Thatcher
Defense Counsel: Timothy R. Volpert

FMLA

Judge Aiken granted in part and denied in part defendant's motion to dismiss. Plaintiff

filed a complaint alleging violations of the Family Medical Leave Act, Oregon Family Medical Leave Act, Americans with Disabilities Act, and a common law claim for wrongful discharge.

Pursuant to FRCP 12(b)(6), defendants moved to dismiss plaintiff's wrongful discharge claim, claims for consequential damages, and the OFLA retaliation claim. Judge Aiken granted defendant's motion to dismiss consequential damages for plaintiff's FMLA and OFLA claims; denied the motions to dismiss plaintiff's wrongful discharge claim and retaliation claim under OFLA; and denied with leave to renew plaintiff's claims for consequential damages for the remaining claims.

Oelke v. Costco Corp.,
CV 04-6439-AA
(Opinion, April 27, 2005)
Plaintiff's Counsel: Suzanne Chanti
Defense Counsel: Victor Kisch